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May 11, 1998

RECEIVED
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE OR LATE FILED

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: Ex Parte Presentation
Dockets Numbered IB-96-261, IB-96-111, CC-93-23,
IB-97-142, IB-95-22, IB-95-22, and RM 7931

Dear Ms. Salas:

This letter is to inform you that on May 11, 1998, I forwarded a copy of the attached article, "WTO Agreement on Basic Telecommunications Services and FCC Implementation," authored by me and published in the Winter 1998 edition of *Communications Lawyer*, to the below-listed staff members with the FCC's International Bureau:

Regina M. Keeney, Bureau Chief
Roderick K. Porter, Deputy Chief
Mindy Ginsburg, Associate Bureau Chief
Peter C. Pappas, Assistant Chief
Robert Calaff, Senior Counsel
Rebecca Arbogast, Senior Legal Advisor
Douglas W. Webbink, Chief Economist
Richard B. Engelman, Chief, Planning and Negotiations Division
Larry W. Olson, Deputy Chief, Planning and Negotiations Division
Diane Cornell, Chief, Telecommunications Division
Thomas Wasilewski, Chief, Multilateral & Development Branch
Brett Hahn, Telecommunications Specialist
Irene Wu, Asian Specialist
Rob Stevens, Economist
Jeffrey Anspacher, Senior Economist
Roxanne McElvane, Attorney
Kate Collins, Attorney, Director of Central Europe and NIS

Laurie Sherman, Senior Legal Advisor
Jeanne Gelman, Telecommunications Support Specialist
John Copes, Attorney
George Li, Deputy Chief, Operations

Because I cited decisions originating from the above-referenced FCC cases in the article, and because those decisions may be subject to appeal, or other issues in said dockets may still be pending, I am submitting this notice of ex parte communication.

In accordance with the requirements Section 1.1206(a) of the Commission's Rules, an original and one copy of this letter and attached article are being submitted to the Secretary's office for filing in each of the above-referenced dockets. If you have any questions, please do not hesitate to contact the undersigned.

Sincerely yours,

Charles M. Oliver

CMO/reh
Attachments

WTO Agreement on Basic Telecommunications Services and FCC Implementation

BY CHARLES M. OLIVER

On February 15, 1997, the United States and sixty-eight other countries concluded an historic series of negotiations by accepting the World Trade Organization (WTO) Agreement on Basic Telecommunications Services.[1] Most of the countries involved, including the United States, promised to implement their initial commitments under the agreement by January 1, 1998. In August 1997 the U.S. Federal Communications Commission (FCC or Commission) adopted its Benchmark Rates Order,[2] limiting the international settlement rates that U.S. carriers will be permitted to pay foreign carriers that terminate international traffic originating in the United States. In November 1997 the Commission adopted the International Satellite Service Order and the Foreign Participation Order liberalizing entry standards for foreign satellite and other telecommunications services.[3] These decisions completed the basic regulatory framework for FCC treatment of foreign telecommunications service providers under the Basic Telecom Agreement.

This article addresses the Basic Telecom Agreement and FCC decisions that explicitly respond to the WTO requirements. This analysis does not cover a much broader set of actions by U.S. courts and regulatory authorities that are also required to fulfill this country's WTO commitments, i.e., decisions implementing the Telecommunications Act of 1996. Because the Basic Telecom Agreement was modeled in large part upon the principles embodied in the Act, the Act can be regarded as a form of implicit implementation before the agreement was signed. A corollary is that, if administrative decisions impede implementation of the Act or if courts discover limitations in the Act that were not recognized by U.S. negotiators when they signed the Basic Telecom Agreement, other countries might have a basis for arguing that the United States is failing to live up to its international commitments.[4]

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For WTO member countries, the Commission eliminated existing requirements that foreign carriers seeking entry into the United States demonstrate that their home markets afford opportunities for entry similar to those permitted in the U.S. The so-called effective competitive opportunities (ECO) test continues to apply to non-WTO member countries. Although generally loosening restrictions on foreign entry, the FCC adopted several regulatory measures designed to prevent anticompetitive conduct by foreign entities and their affiliates.

The FCC takes the position that WTO obligations both permit and require participating governments to prevent anticompetitive conduct in ways that do not discriminate against companies on the basis of foreign ownership. The agency compared its foreign entry requirements to safeguards it has applied to domestic incumbent local exchange carriers (ILECs) when they enter competitive telecommunications markets such as interexchange service, mobile telephony, and enhanced services.

Foreign Carrier Entry Order

For many years, the FCC engaged in ad hoc reviews of foreign entry applications. The Foreign Carrier Entry Order, adopted in November 1995, provided a more structured framework and reflected an intensified commitment to open foreign markets.[5] The rules adopted in that order dealt both with applications for facilities authorizations under section 214 of the Communications Act of 1934 and with applications for common carrier radio licenses under Title III of the Act. The Commission applied an ECO test to applications for international facilities-based, switched resale, and noninterconnected private line resale under section 214 in circumstances where an applicant sought authority to provide the service between the United States and a destination market in which an affiliated foreign carrier had market power. In general, for purposes of applying the ECO test under section 214, the FCC considered an applicant to be affiliated with a foreign carrier when the foreign carrier owned more than 25 percent of the applicant or controlled the applicant by other means. In the Title III context, the Commission applied the ECO test to common carrier radio applicants or licensees that owned the applicant or sought to expand their ownership interest in the applicant beyond 25 percent. The ECO test looked at the de jure ability and the practical ability of U.S. carriers to enter the home market of the foreign carrier.

In May 1996 the Commission proposed to adopt rules applying the ECO test to non-U.S. licensed satellite operators seeking to serve the United States[6] but placed that proceeding on hold pending completion of the WTO's basic telecommunications negotiations.

WTO Basic Telecom Agreement

When the WTO was created in 1994, the United States and other WTO members committed to allow market access for a broad range of services, including value-added telecommunications services. The members agreed to extend the negotiations for a limited number of service sectors, including basic telecommunications.

The Foreign Participation Order states that, under the Basic Telecom Agreement, forty-four WTO members representing 99 percent of WTO members' total basic telecommunications service revenues will permit foreign ownership or control of all telecommunications services and facilities.

The accompanying charts illustrate the breathtaking scope of the Basic Telecom Agreement, along with its limitations. As shown in Figure 1, nations representing 82 percent of world telecommunications revenues have committed to open four of the biggest bottleneck monopolies—local public telephone services, domestic long distance voice services, international public voice services, and satellite services—by 1998. The same nations represent 79 percent of the world economy (cumulative GNPs). The WTO commitments are far more modest when characterized as a percentage of world population. Figure 2 shows that only 19 percent of the world's population is represented by countries that have agreed to open all four major bottleneck monopoly services by 1998. That figure barely rises in subsequent years to 23 percent.

Substance of Promises Made

The WTO negotiations revolved around a generic statement of commitments, referred to as "the reference paper," which most countries folded into their national schedules of specific commitments,[7] and two official notes by the WTO chairman interpreting the reference paper.[8] Schedules representing all but four of the governments involved in the agreement include the reference paper with few, if any modifications, but nearly all of those schedules contain separate lists of limitations defining where and how a government will not conform to the reference paper. The reference paper supplied a default set of options from which countries were free to depart during the negotiating process, provided that they defined the exceptions.

The chair's first note was prepared in response to concerns expressed by satellite service and other suppliers. It stipulates that, unless otherwise noted, any basic telecommunications service listed in a government's schedule of commitments may be provided through any means of technology, including cable, wireless, or satellites. The second note responds to requests for clarification from WTO member governments by stating that any market-opening commitments are implicitly subject to the availability of radio spectra.

The reference paper reads like a capsule summary of the Telecommunications Act of 1996. Its most far-reaching paragraph provides that interconnection with a major supplier will be ensured "at any technically feasible point in the network," under nondiscriminatory terms; in a timely fashion; and at cost-oriented rates that are transparent, reasonable, and sufficiently unbundled that the competitive entrant will not need to pay for network components or facilities that it does not require. In the United States, similar language is interpreted as requiring incumbent local exchange telephone companies to provide unbundled local loops at cost-based rates and to allow interconnection with the competitive supplier's network at the telephone company's switching office.

If the American experience is a guide, ferocious battles will be fought over the prices that telephone companies will be allowed to charge for access to their local loops. The significance and complexity of this issue are being heightened by the advent of digital subscriber line (DSL) equipment that is capable of pumping data at very high speeds over local loops.

Depending upon implementation, the confluence of DSL technologies with unbundled local loops could lead to a significant expansion in the market for fiber-delivered data services and for international satellite services, delivered via earth stations situated at or near telephone company switching offices.

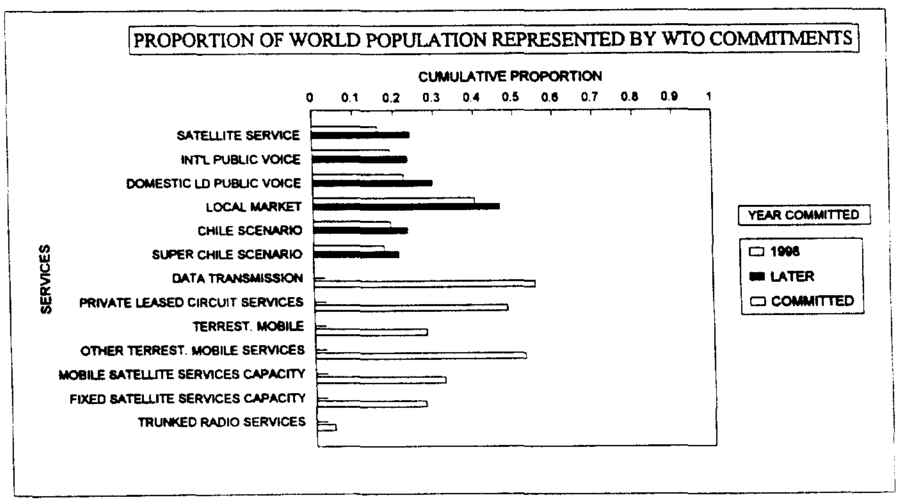
The General Agreement on Trade in Services provides that each member must promptly and at least annually inform the WTO's Council for Trade in Services of the introduction of any new, or any changes to existing laws, regulations, or administrative guidelines that significantly affect trade in services covered by its specific commitments rendered in the WTO framework.[9] Each member is also required to establish one or more inquiry points to provide specific information to other members, upon request, on all relevant matters.[10]

Significance of Promises Made

Over the past quarter century, the United States has introduced competition to successive layers of its telecommunications infrastructure, the most recent major step being Congress's decision in 1996 to open urban telephone markets to local competition. This process of progressive liberalization has brought significant benefits to consumers. However, the process has been slow, revealing that if some, but not all, bottlenecks in the transmission path are cleared of monopoly control, whoever controls the remaining bottleneck will discourage competition in the hope of collecting monopoly rents. To borrow an analogy that was once applied to Gorbachev's way of reforming the Soviet Union, we made a gradual transition from driving on the left-hand side of the road to driving on the right-hand side. The transition has been difficult and painful and may not have worked at all if regulatory traffic cops had not been present to manage the process.

At least one other country has moved more rapidly toward competition. Chile's transition has been both quick and successful. In that country, international rates fell by 46 percent from 1989 to 1994 as a result of limited competition, and domestic long distance rates fell by 38 percent over the same period. The government then took liberalization a step further by authorizing several companies to lease satellite capacity directly from INTELSAT and

Figure 1



acquire and operate their own earth stations. In October 1994 a new law went into effect enabling end users to access the long distance telephone carriers of their choice. Prices plummeted still further. By December 1994 the volume of international calls to and from Chile increased by 35 percent from the pre-October level. By June 1995 prices for international calls had stabilized at a level that was approximately 60 percent lower than they had been before October 1994, and even further below the prices that had prevailed in 1989.[11]

Super-Chile Scenario

Prices fell and traffic volume rose in Chile because that country cleared several of the bottlenecks that had previously constrained supply, including both domestic long distance and international service monopolies. Yet Chile still has not committed itself to allow competition in the provision of local exchange services. Figures 1 and 2 portray both a Chile scenario and a "Super-Chile" scenario. Under the WTO Basic Telecom Agreement, countries representing 82 percent of world telecommunications revenues and 79 percent of the world economy have committed themselves to implement the Super-Chile scenario by 1998. It is scarcely believable that such a transition could actually occur in such a short time, but the mere fact that so many countries have said they will do so is astonishing.

The WTO Basic Telecom Agreement is meaningful only to the extent that it can be effectively enforced. Enforcement mechanisms will come into play at two and, in some cases, three levels. The least contentious scenario would involve a national government that is voluntarily enforcing commitments under the agreement in a way that does not antagonize any other participating countries. The reference paper provides that the committing government will maintain or establish a regulatory body that is separate from, and not accountable to, any supplier of basic telecommunications services and that its decisions and procedures will be impartial with respect to all market participants. The regulator must make publicly available all licensing criteria and the period of time normally required to reach a decision concerning an application for a license. Service suppliers requesting interconnection with a major supplier will have recourse to an independent domestic body for resolution of disputes within a reasonable period of time.

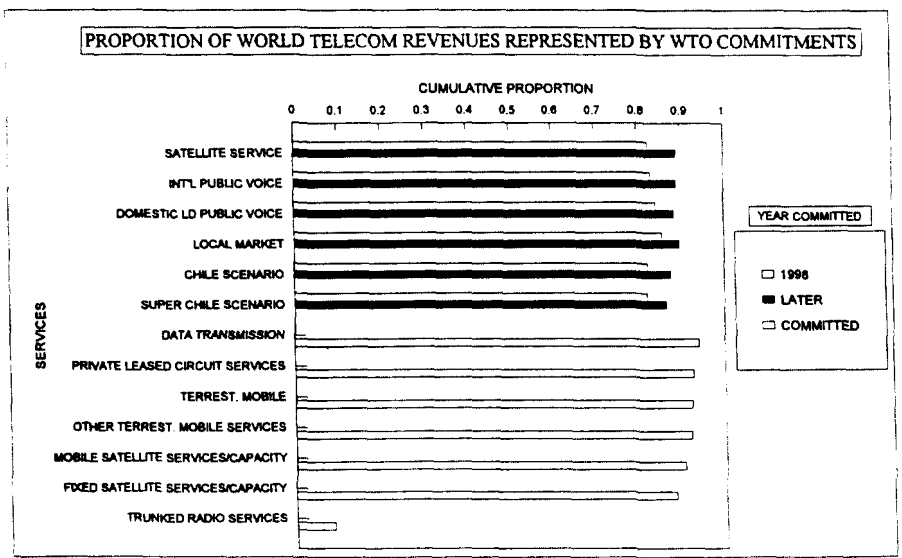
Such language is, of course, subject to a wide range of interpretations. The real meaning of the reference paper will ultimately be defined in the WTO's dispute resolution process, though for some countries there could be an intermediate step: the European Council has indicated that it is prepared to prosecute noncomplying countries through its own processes. For purposes of enforcing a multilateral agreement like the Agreement on Basic Telecommunications Services, the WTO will establish a dispute settlement body (DSB) consisting of only those members that are parties to that agreement, i.e., only those members that are parties to the telecom agreement will be empowered to participate in decisions or actions taken by the DSB with respect to that agreement.[12]

WTO litigation will proceed as follows: if consultations between the disagreeing national governments fail to settle a dispute within sixty days after the date of receipt of a request for consultations, the complaining party may request the establishment of a WTO panel.[13] Panels will usually consist of three persons unless the parties to the dispute mutually agree to a five-person panel.[14] To assist in the selection of panelists, the WTO secretariat will maintain a list of governmental and nongovernmental individuals possessing requisite qualifications.[15] The secretariat will propose nominations for the panel to the parties to the dispute; if the parties do not agree on the panelists within twenty days, the WTO director-general, in consultation with the chair of the DSB and the chair of the relevant DSB committee, will determine the composition of the panel.[16] Panelists are supposed to serve as individuals and not as representatives of governments or any other organization.[17]

Appeal of Panel Decisions

Panel decisions can be appealed to a three-person tribunal drawn from a standing appellate body established by the DSB, consisting of seven persons. The DSB will appoint persons to serve on the appellate body for four-year terms.[18] Appellate tribunals will limit their decisions to issues of law covered in lower panel reports.[19] For all practical purposes, it appears that appellate tribunal decisions will be the end of the line, because their reports "shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate body report."[20] DSB consensus to override the appellate body will presumably be unusual because the winning party in every dispute will be a DSB member. Losers in the process will have a choice of three options: comply with the appellate body ruling by bringing its laws into compliance,[21] adopt alternative compensatory measures satisfactory to the complainant, or face suspension of the complainant's reciprocal

Figure 2



obligations to the defendant under the Agreement on Basic Telecommunications Services.[22]

As drafted, the WTO dispute resolution process has at least the potential to be rigorous and efficient, but it will not be freely accessible to any company that considers itself an injured party. Under U.S. law, no person other than the U.S. Government itself will have any cause of action or defense before the WTO.[23] This is consistent with the WTO's dispute annex, which itself provides an opportunity for action or defense only by WTO members, i.e., governments. It seems likely that provisions similar to U.S. legislation on the subject will be found in the laws of other nations. The implication is that national governments both here and abroad will serve as gatekeepers and exercise their sovereign authority to choose which cases to litigate.

The United States is likely to be the most litigious participant, because it is the largest telecommunications market and is home to several large companies with global aspirations. Despite that, USTR officials have indicated that they will be highly selective in pursuing grievances, because they want to present the WTO with cases that the United States will win and that will establish significant precedents. Under the process that USTR envisions, a fully articulated interpretation of the WTO Agreement on Basic Telecommunications will emerge slowly through many years of litigation.

Despite those caveats, the Basic Telecom Agreement more than justifies the Commission's decision to eliminate the ECO test for parties to the agreement. The WTO dispute resolution process provides an internationally recognized forum for resolving disputes that stands a fair chance of producing meaningful results, though the results might require years of litigation. The ECO test was wielded unilaterally by this country and potentially invited unilateral retaliation from other countries. The most important reason for eliminating the ECO test is that there is really no way to have both it and the Basic Telecom Agreement: whatever substantive arguments might have been marshaled in favor of continuing the ECO test, the Basic Telecom Agreement and underlying WTO rules bar the application of an ECO-type test to parties to the agreement and could expose the United States to WTO sanctions if it does not comply.

As discussed below, the FCC wants to avoid committing any fouls under WTO requirements, but it is not willing to place the nation's destiny entirely in the hands of the WTO. The FCC has preserved its ability to wield a variety of mechanisms that could make life difficult for countries that fail to honor their WTO commitments or honor them in a half-hearted way.

FCC's Stated and Unstated Goals

If the FCC's discussion of goals and purposes in its recently adopted international orders were taken at face value, one would infer that encouraging foreign governments to open their markets has now receded to a tertiary status on the agency's international agenda. The Commission has stated that the primary purpose of its new rules is to promote effective competition in the U.S. telecommunications services market by inviting foreign entrants in, and the secondary purpose is to prevent anticompetitive conduct in the provision of international services or facilities.

The real story, of course, is that the Commission continues to be intensely interested in leveraging foreign markets open for U.S.-based companies, but the Basic Telecom Agreement now precludes the U.S. Government from overtly applying ECO-like reciprocity tests outside of the WTO dispute resolution process. The WTO does allow governments to prevent anticompetitive conduct, however, and the Commission has made clear that it will continue to exercise its powers under that new banner. If defending the American consumer at home happens to further the strategic interests of American companies abroad, the FCC will not be discomfited.

Open Entry Policies Toward WTO Member Countries

For applicants from WTO member countries seeking to enter the U.S. market, the Foreign Participation Order eliminates the requirement of demonstrating that the foreign markets involved offer effective competitive opportunities and replaces it with a rebuttable presumption in favor of approval. In those circumstances, the ECO test will no longer be applied to applications for section 214 service authorizations, cable landing licenses, or permission to increase foreign indirect ownership of nonbroadcast radio licensees above 25 percent. The International Satellite Service Order applies a similar presumption in favor of approval for applicants seeking authorization to provide domestic or international telecommunications service to the United States through satellites licensed by WTO member countries. The presumption in favor of entry will apply both to private companies and to affiliates of intergovernmental satellite organizations (IGOs) licensed by WTO members. The ECO test will continue to apply to non-WTO countries, and it will be applied to services not covered by the Basic Telecom Agreement, i.e., direct-to-home (DTH), direct broadcast satellite, and digital audio radio services.

The Commission also addressed the unique circumstances of COMSAT, the U.S. signatory to INTELSAT and Inmarsat and the exclusive provider of services through those entities in the U.S. As intergovernmental satellite organizations that are not members of the WTO, INTELSAT and Inmarsat do not have any direct rights under the Basic Telecom Agreement. However, the Commission decided that COMSAT should be permitted to obtain authorization to provide U.S. domestic service via INTELSAT or Inmarsat satellites—if COMSAT waives any IGO-derived immunity from suit and demonstrates that the services proposed will enhance competition in the U.S. market. The Commission did not discuss how it would respond if COMSAT were to propose beaming DTH signals from INTELSAT satellites into the U.S. market. In the past, the U.S. executive branch unsuccessfully opposed provision of DTH services by INTELSAT to other countries on the ground that such services are ultra vires with respect to the INTELSAT agreement. An INTELSAT DTH proposal directed toward the United States would probably raise both eyebrows and blood pressure levels in Washington, even though the FCC has not specifically ruled out an authorization of that kind.

The Commission revised a special rule that had applied to carriers seeking to connect international private lines to the public-switched network and provide services to the public. Previously, the agency had required carriers seek-

provide such service to demon-
...ate that the foreign country on the
...end of the private line allows
...able opportunities equivalent to those
...rmitted in the United States. The
...mmission said that it will no longer
...quire equivalency demonstrations in
...ch applications involving WTO
...ember countries, if at least 50 percent
...f the U.S.-billed traffic on the routes
... question are at or below the relevant
...enchmarks adopted in the Benchmark
Rates Order. Otherwise, equivalency
demonstrations will continue to be
required before the agency will grant
authorization to interconnect interna-
tional private lines to public switched
telephone networks.

Benchmark Rates Order

The Benchmark Rates Order limits the amounts that U.S. carriers will be permitted to pay foreign carriers that terminate international traffic originating in the United States. The timing of the decision, three months before rules were adopted opening the U.S. market to foreign competitors, provides some insight into the FCC's sense of priorities. The prospect of increased foreign entry strengthened the Commission's determination to deter foreign carriers from exploiting monopoly advantages, even though other countries were challenging the agency's proposals as a form of extraterritorial regulation.

The FCC asserted that its action was necessary because the settlement rates that U.S. carriers have been paying to foreign carriers are in most cases substantially above the costs foreign carriers incur to terminate that traffic. The Commission said that this long-standing concern had become more pressing as it moved toward implementation of the market-opening commitments in the Basic Telecom Agreement. If a foreign carrier were to enter the U.S. market for the purpose of originating calls bound toward its home market, inflated settlement payments made to its home-based affiliate would represent merely an internal transfer of funds for the foreign carrier, but would represent a real out-of-pocket cost to unaffiliated carriers, thereby placing them at a competitive disadvantage.

If it is successfully implemented, the Benchmark Rates Order will reduce the rates paid by American consumers when dialing foreign points and ameliorate the U.S. balance of payments deficit. Policymakers have been wringing their hands over this issue for many years, however, and it is more than coincidental that they decided to do something about it not long after the Basic Telecom Agreement was adopted. If foreign carriers gained the right to enter the largest telecommunications market while retaining the ability to collect monopoly rents from American competitors, U.S. telecommunications carriers would be disadvantaged.

The first target date for U.S. carriers to negotiate rates at or below the settlement rate benchmarks in the Benchmark Rates Order will be January 1, 1999, for carriers in upper income countries ($0.15 per minute). Subsequent deadlines at one year intervals will apply to carriers in upper middle income countries ($0.19 per minute), followed in successive years by lower middle-income countries (also at $0.19 per minute), low-income countries ($0.23 per minute), and countries with fewer than one telephone line per 100 inhabitants ($0.23 per minute). These deadlines will be accelerated, however, for carriers seeking authorizations to provide facilities-based switched or private line service to foreign affiliates: such authorizations will be conditioned upon the foreign carrier offering U.S.-licensed international carriers a settlement rate at or below the relevant benchmark adopted in the Benchmark Rates Order.

Under the U.S. Administrative Procedures Act, a federal court of appeals can vacate an FCC rulemaking order if the order is "arbitrary and capricious." Companies or governments seeking to overturn the Benchmark Rates Order or to escape its application to them can obtain recourse from the U.S. judicial system if they can demonstrate that there have been significant flaws in the Commission's reasoning process. The Benchmark Rates Order is particularly vulnerable to such challenges because, as the FCC admitted in the order, "no commenter has provided cost data in the record about the costs of providing international termination services."[24]

As a surrogate for cost-based rate analysis, the Commission relied instead on what it calls the "tariffed components price" (TCP) methodology. That methodology is based in large part on an average of tariffed rates for domestic telecommunications services among all the countries within a given income range, with no adjustments made for the sizes of the countries involved, population density, terrain, or local labor and material costs. Prices for the international gateway switching component are based on a study conducted by the International Telecommunications Union. Prices for the international facility component are based on foreign carriers' private line rates.

In computing the relevant domestic tariffed telecommunications rates, the FCC has relied upon proprietary call distribution data provided by AT&T, containing information collected on AT&T's customers' calls during a three-month period that began on January 6, 1996.[25] Thus, even if the FCC had attempted to tailor its benchmark rates to individual countries, the Benchmark Rates Order would provide no means of differentiating among carriers with different call distribution patterns within a country. However, the FCC emphasized that any carrier may ask it to reconsider, in a specific case, the benchmarks on the grounds that they do not permit a carrier to recover the incremental costs of providing international termination service.[26] To the extent that a foreign carrier seeks to challenge the rate caps applied under the Benchmark Rates Order, the most obvious starting point for an analysis would be to compare the rate caps adopted by the Commission with the rate caps that would have applied if the Commission had used its TCP methodology but refrained from averaging the results across all countries within a given per capita income range.[27]

The Commission admitted that its benchmark rates are based in part on noncost factors, including altruistic concern for the welfare of poor countries.[28] The implication of this policy is that some telecommunications companies will be deprived of international termination revenues solely because they happen to be based in higher income countries. However commendable the FCC's policies may be in this regard from a social engineering standpoint, this kind of foreign policy consideration is not readily apparent in the agency's authorizing statute. Commission orders have frequently been overturned on the ground that the agency was straying outside its congressionally authorized mission, even where the courts expressed moral approval of the agency's intentions.

For the financial sector, concern over the Benchmark Rates Order may be less oriented toward challenges than toward a dispassionate appraisal of the likelihood that the order will actually be enforced with respect to specific routes. For some companies, effective implementation of the order could present significant opportunities for new business. For example, the Commission notes that a 30 percent reduction in prices for international calls from Chile to the United States led to a 260 percent increase in traffic volume on that route. Traffic increases of that scale might justify investment in additional facilities such as fiber optic cables or high-capacity satellite systems.

The Benchmark Rates Order will be a continuing source of controversy, because other countries, rightly or wrongly, tend to see it as a form of extraterritorial regulation.

The Benchmark Rates Order could generate other, more perverse sorts of opportunities as well. If settlement rates are artificially distorted and rate differentials bear little relationship to differences in cost, telecommunications carriers may rely to an increasing extent on hubbing, refiling, and other indirect routing procedures. Traffic patterns will inevitably flow toward low-priced routes, even if those routes require indirect routing. Rapid and unpredicted changes in rates could erode traffic that had been counted upon to finance cables following set routes, while perhaps shifting some competitive advantage back to satellites because of their flexibility.

Other Safeguards

Other international safeguards appear to represent either a relaxation of past constraints or an application of separation requirements comparable to those applied to domestic carriers. In the past, the Commission has generally prohibited U.S. carriers from entering into exclusive arrangements with foreign carriers. The Foreign Participation Order narrows the "No Special Concessions" rule so that it only prohibits exclusive arrangements with foreign carriers that possess sufficient market power on the foreign end of a U.S. international route to affect competition adversely in the U.S. international services market. The Commission adopted a rebuttable presumption that a carrier with less than a 50 percent market share in each relevant foreign market lacks such market power.

The Foreign Participation Order modified the Commission's tariffing requirement to remove a fourteen-day advance notice requirement and accept international tariff filings on one day's advance notice with a presumption of lawfulness. The Commission adopted a limited structural separation requirement and required foreign-affiliated dominant carriers to file regular reports on traffic, revenue, provisioning, maintenance, and circuit status. Significantly, however, the agency declined to adopt proposals it had floated in the notice stage of the proceeding to limit the ability of U.S. carriers to enter into exclusive arrangements with their foreign affiliates for the joint marketing of basic telecommunications services, the steering of customers by the foreign affiliate to the U.S. carrier, or the use of foreign market telephone customer information. Approval by U.S. customers is required before using information about them obtained from foreign affiliates.

The Commission reserved its authority to apply special safeguards on the basis of ad hoc determinations. The agency said it retains authority to bar market entry in highly unusual circumstances, where it is apparent that participation by a foreign entity will adversely affect competition in the U.S. market or where the executive branch of the U.S. Government expresses concern over national security issues.

Conclusion

By adopting the International Satellite Service Order and the Foreign Participation Order, the FCC has signaled its willingness to deliver on U.S. commitments under the Basic Telecom Agreement. It appears likely that all or nearly all applications from WTO member countries for permission to enter or invest in the U.S. telecommunications market will be granted. This represents an opportunity for foreign companies, American companies seeking capital and strategic partners, and American consumers.

The controversies that survive will center around what conditions are attached to foreign entry applications. It is inevitable that at least some foreign entities will argue that they are victims of xenophobia or nationalistic protectionism, though the FCC will argue that it has a long-standing history of applying similar safeguards to dominant domestic carriers. The Benchmark Rates Order will be a continuing source of controversy, because other countries, rightly or wrongly, tend to see it as a form of extraterritorial regulation. For many of them, the first impulse will be to attack it head-on as another expression of American hegemony. Those attacks will probably be unsuccessful, if only because the Administrative Procedures Act does not recognize hegemony as a basis for reversible error. In the American court system, the Benchmark Rates Order is far more vulnerable on other grounds. The FCC can limit those vulnerabilities if it is careful; its opponents will exploit them if they are smart.

Endnotes

1. Hereinafter referred to as "the Basic Telecom Agreement."

2. International Settlement Rates, 97 F.C.C. 280 (Aug. 18, 1997).

3. Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, 97 F.C.C. 399 (Nov. 26, 1997) (International Satellite Service Order); Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, 97 F.C.C. 398 (Nov. 26, 1997) (Foreign Participation Order).

4. A recent article by the author discusses some of the many difficulties that have impeded implementation of the Telecommunications Act of 1996. Charles M. Oliver, *The Information Superhighway: Trolls at*

the Toll Gate, 49 FED. COMM. L.J. 53 (1997).

5. Market Entry and Regulation of Foreign-Affiliated Entities, 11 F.C.C. Rcd 3873 (1995).

6. Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, Notice of Proposed Rulemaking, 11 FCC Rcd 18178 (1996).

7. *See, e.g.,* U.S. Schedule of Specific Commitments, GATS/SC/90/Supp. 2 (Apr. 11, 1997) at 4- 6.

8. World Trade Organization, Notes for Scheduling Basic Telecom Services Commitments, S/GBT/W/2/Rev. 1 (Jan. 16, 1997) (the chair's first note); World Trade Organization, Market Access Limitations on Spectrum Availability, S/GBT/W/3 (Feb. 3, 1997) (chair's second note).

9. General Agreement on Trade in Services, 33 I.L.M. 1167 (1994), part II, art. III, ¶ 3.

10. *Id.*, part II, art. III, ¶ 4.

11. See BEN PETRAZZINI, GLOBAL TELECOM TALKS: A TRILLION DOLLAR DEAL 33 (Washington, D.C.: Inst. for Int'l Econ. 1996); Jonathan Friedland, *Chile's ENTEL Seeks Long-Distance Affair*, WALL ST. J., June 5, 1995, at A10; Karen Lynch, *Chile Gives the Industry a Lesson in Competition*, COMM. WK. INT'L, Dec. 12, 1994, at 1; Karen Lynch, *Latin Overhaul*, COMM. WK. INT'L, Feb. 7, 1994, at 4; *Price-Cutting War Arrested by Heavy Losses: Chilean Phone Firms Think Again*, LATIN AM. NEWSLTRS., LTD., May 4, 1995 (available on NEXIS); William R. Long, *Investors Dial Up Chilean Market: There Is Fierce Competition Since the Government Ended the Long-Distance Monopoly*, L.A. TIMES, Dec. 6, 1994, at 3.

12. Marrakesh Agreement Establishing the World Trade Organization, Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Annex), art. 2, ¶ 1.

13. *Id.*, art. 4, ¶ 7.

14. *Id.*, art. 8, ¶ 5.

15. *Id.*, art. 8, ¶ 4.

16. *Id.*, art. 8, ¶ 7.

17. *Id.*, art. 8, ¶ 9.

18. Some of the initial appointees will begin with two-year terms. *Id.*, art. 17, ¶¶1-2.

19. *Id.*, art. 17, ¶ 5.

20. *Id.*, art. 17, ¶ 14.

21. *Id.*, art. 21.

22. *Id.*, art. 22.

23. Uruguay Round Agreements Act, § 102(c)(1), codified at 19 U.S.C. § 3512.

24. Benchmark Rates Order at ¶ 42.

25. *Id.* at ¶ 83.

26. *Id.* at ¶ 74.

27. *Compare* the rate caps cited above with the unaveraged TCP rates shown in Appendix D of the Benchmark Rates Order.

28. *Id.* at ¶ 106.